

ORIGINAL
FILE
RECEIVED
DEC 22 1992
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Application of Open Network)
Architecture and Nondiscrimination)
Safeguards to GTE Corporation)

CC Docket No. 92-256

PETITION TO EXPAND THE SCOPE OF RULEMAKING

Pursuant to Section 1.41 of the Commission's rules, the North American Telecommunications Association ("NATA") hereby requests the Commission expeditiously to expand the scope of this rulemaking proceeding to consider whether to apply nondiscrimination safeguards to GTE's provision of customer premises equipment ("CPE").^{1/}

The expeditious issuance of a further or supplemental notice of proposed rulemaking on this subject is necessary, appropriate, and timely for the reasons stated in the attached letter from Albert H. Kramer, to FCC Chairman Alfred Sikes. Also attached is a Petition for Declaratory Ruling filed by the Public Telephone Council on July 18, 1988, requesting substantially the same relief. The attached letter and petition provide additional discussion of the substance of the rule change proposed herein and the facts and arguments supporting such change and are hereby incorporated by

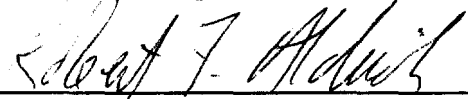
^{1/}The Commission could issue either a "supplemental" or "further" notice of proposed rulemaking to consider these matters. Such action is clearly authorized by the Commission's rules (e.g., 47 CFR § 1.421). Alternatively, on its own motion, the Commission could begin a parallel rulemaking by issuing a notice of proposed rulemaking in a new docket. In the event that the Commission chooses the latter alternative, NATA requests that the Commission waive its procedural rules to the extent necessary to enable the Commission to begin the rulemaking without delay.

No. of Copies rec'd 064
List A B C D E

reference in this Petition.

WHEREFORE, NATA requests expeditious issuance of a supplemental or further notice of proposed rulemaking to apply nondiscrimination safeguards to GTE's provision of CPE.

Respectfully submitted,



Albert H. Kramer
Robert F. Aldrich

KECK, MAHIN & CATE
1201 New York Avenue, N.W.
Penthouse Suite
Washington, D.C. 20005
(202) 789-3401

Attorneys for the North
American Telecommunications
Association

Dated: December 22, 1992

KECK, MAHIN & CATE

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

8300 SEARS TOWER
233 SOUTH WACKER DRIVE
CHICAGO, ILLINOIS 60606-6589
(312) 876-3400

FACSIMILE (312) 876-3582
TELEX 25-3411

1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3919
(202) 789-3400

FACSIMILE (202) 789-1158

LOS ANGELES, CALIFORNIA
SAN FRANCISCO, CALIFORNIA
HOUSTON, TEXAS
PEORIA, ILLINOIS
SCHAUMBURG, ILLINOIS
OAKBROOK TERRACE, ILLINOIS

December 22, 1992

FILE NUMBER

DIRECT DIAL

Chairman Alfred C. Sikes
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

RECEIVED
DEC 22 1992
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
KECK, MAHIN CATE & KOETHER
NEW YORK, NEW YORK
FAR HILLS, NEW JERSEY

Re: CC Docket No. 92-256

Dear Chairman Sikes:

I am writing on behalf of the North American Telecommunications Association ("NATA"), a trade association of manufacturers, suppliers, distributors, and retailers of customer premises equipment ("CPE"). NATA is a trade association composed of more than 600 manufacturers, suppliers, distributors, and users of business telecommunications equipment. Founded in 1970, NATA exists to promote competitive markets and healthy sales and support channels for users of business and public communications products and services. NATA has actively participated in FCC proceedings affecting CPE markets. NATA supports regulatory policies that promote full and fair competition in the telecommunications equipment and services distribution marketplace.

In a Notice of Proposed Rulemaking released December 2, you and the other Commissioners have tentatively concluded that it is now appropriate to apply "nonstructural safeguards" -- customer proprietary network information ("CPNI") disclosure, network information disclosure, nondiscrimination plans, and open network architecture ("ONA") requirements -- to GTE's provision of enhanced services. Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, Notice of Proposed Rulemaking, CC Docket No. 92-256, FCC 92-495 (released December 2, 1992) ("GTE Notice"). For the same reasons, the same conclusion is warranted regarding the application of nonstructural safeguards to GTE's provision of CPE. Therefore, NATA requests that you issue a supplemental or further notice of proposed rulemaking in CC

KECK, MAHIN & CATE

Chairman Alfred C. Sikes

December 22, 1992

Page 2

Docket No. 92-256, to apply nonstructural safeguards to GTE's provision of CPE.^{1/}

Specifically, the same nonstructural safeguards currently applicable to the Bell Operating Companies' ("BOCs") provision of CPE -- including CPNI disclosure, network information disclosure, nondiscrimination plans, centralized operations groups ("COGs"), and joint marketing/sales agency -- should apply to GTE's provision of CPE.

In so doing, you will continue the Commission's historical practice of applying consistent regulatory treatment to carrier provision of CPE and of enhanced services. Ever since the initial Computer II decisions,^{2/} the Commission has recognized that similar considerations apply to its regulation of CPE and enhanced service markets, and has applied identical or closely similar rules to carriers' participation in these two market sectors. In Computer II, the Commission concluded that neither CPE nor enhanced services should be subject to rate regulation, and adopted a single rule to govern carriers' provision of both CPE and enhanced services. 47 CFR § 64.702.

Since the initial Computer II ruling, the Commission has revisited on a number of occasions the question of what regulatory safeguards should apply to various carriers' offerings of CPE and enhanced services. Throughout these subsequent proceedings, while the Commission has changed its views on the appropriate safeguards applicable to various carriers, the Commission has maintained careful consistency in its regulation of the CPE and enhanced service offerings of particular carriers.

The initial Computer II determination was that both CPE and enhanced services, when provided by the Bell System, should be provided through a separate subsidiary. Computer II Final Decision, 77 FCC 2d at 466-70. In that decision, the Commission

^{1/}Alternatively, on its own motion, the Commission could begin a parallel rulemaking by issuing a notice of proposed rulemaking in a new docket.

^{2/}Amendment of Section 64.702 of the Commission's Rules and Regulations, (Second Computer Inquiry), Final Decision, 77 FCC 2d 384 ("Computer II Final Decision"), recon., 84 FCC 2d 50 (1980) ("Computer II Reconsideration"), further recon., 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983), second further recon., FCC 84-190 (released May 4, 1984).

KECK, MAHIN & CATE

Chairman Alfred C. Sikes
December 22, 1992
Page 3

also initially determined that the separate subsidiary requirement should apply to GTE's provision of both CPE and enhanced services. Id. On reconsideration, the Commission changed its view regarding the application of the separate subsidiary requirement to GTE. Computer II Reconsideration, 84 FCC 2d at 72-75. However, the Commission maintained consistency between CPE and enhanced services by relieving GTE of the separate subsidiary requirement with respect to both types of offerings. Id. Subsequently, in 1984, the Commission determined that the Computer II separate subsidiary requirement should continue to apply to the divested BOCs. Again, this determination was applied consistently with respect to both CPE and enhanced services offerings of the BOCs.^{3/}

A few years later, the Commission reopened the issue of what types of safeguards should apply to local exchange carriers' provision of CPE and enhanced services. This time, the Commission considered the safeguards issues regarding CPE and enhanced services in separate proceedings. However, the Commission reached the same conclusions regarding both CPE and enhanced services. In the Computer III inquiry, begun in 1985, the Commission proposed to remove the separate subsidiary requirement then applicable to the BOCs' provision of enhanced services.^{4/} While the Computer III

^{3/}Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117 (1984), aff'd sub nom. Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (7th Cir. 1984), recon., FCC 84-252, 49 Fed. Reg. 26056 (1984), aff'd sub nom. North American Telecommunications Association v. FCC, 772 F.2d 1282 (7th Cir. 1985).

^{4/}See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Phase I, 104 FCC 2d 958 (1986), recon., 2 FCC Rcd 3035 (1987), further recon., 3 FCC Rcd 1135 (1988), second further recon., 4 FCC Rcd 5927 (1989); Phase II, 2 FCC Rcd 3072 (1987) ("Enhanced Services Safeguards Order"), recon., 3 FCC Rcd 1150 (1988); further recon., 4 FCC Rcd 5927 (1988); rev'd sub nom. California v. FCC, 905 F.2d 1217 (9th Cir., 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990), recon., 7 FCC Rcd 909 (1992), pets. for review pending, California v. FCC, No. 90-70336 (and consolidated cases) (9th Cir., filed July 5, 1990); Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991), pets. for recon. pending, pets. for rev. pending, California v. FCC, No. 92-70083 (and consolidated cases) (9th Cir., filed Feb. 14, 1992); Filing and Review of Open Network
(continued...)

KECK, MAHIN & CATE

Chairman Alfred C. Sikes
December 22, 1992
Page 4

inquiry was pending, the Commission also proposed to remove the separate subsidiary requirement applicable to the Bell Operating Companies' provision of CPE.^{5/} In both proceedings, the Commission adopted decisions removing the separate subsidiary requirement from the BOCs.

To replace separate subsidiary requirements, the Commission proposed certain nonstructural safeguards. In the CPE Safeguards proceeding, the Commission adopted a set of nonstructural safeguards for the BOCs' provision of CPE. CPE Safeguards Order at 148-56. The Commission also considered whether to apply these nonstructural CPE safeguards to GTE and/or other independent telephone companies, and decided not to do so. Id. at 156-58. Soon afterward, in the parallel Computer III proceeding, the Commission adopted closely similar nonstructural safeguards to govern the BOCs' provision of enhanced services. Enhanced Services Safeguards Order at 3082-99. Again, the Commission decided not to apply the nonstructural safeguards to enhanced services offered by GTE or other independent telephone companies. Id. at 3101-02.

There are close similarities between the nonstructural safeguards adopted by the Commission to protect the CPE market from discrimination by the BOCs, and those adopted to protect the enhanced services market. The same CPNI and network disclosure safeguards that apply to the BOCs' provision of enhanced services apply, with certain variations, to the BOCs' provision of CPE.^{6/}

^{4/}(...continued)

Architecture Plans, 4 FCC Rcd 1 (1988), 5 FCC Rcd 3084 (1990), 5 FCC Rcd 3103 (1990), Erratum, 5 FCC Rcd 4045, pets. for recon. pending, pets. for review pending, California v. FCC, No. 90-70336 (and consolidated cases) (9th Cir., filed July 5, 1990), 6 FCC Rcd 7646 (1991), pets. for review pending, MCI Telecommunications Corp. v. FCC, No. 92-70189 (9th Cir., filed Feb. 19, 1992).

^{5/}Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies, 2 FCC Rcd 143 ("CPE Safeguards Order"), modified on recon., 3 FCC Rcd 22 (1987), aff'd sub nom., Illinois Bell Telephone Co. v. FCC, 883 F.2d 104 (1989).

^{6/}With respect to CPNI, the Commission initially adopted the identical nonstructural safeguards for BOC provision of CPE and enhanced services. In the Computer III Remand proceedings, the Commission modified the enhanced services CPNI safeguard somewhat by requiring prior customer authorization before the CPNI of customers with more than 20 lines can be used for marketing of BOC
(continued...)

KECK, MAHIN & CATE

Chairman Alfred C. Sikes
December 22, 1992
Page 5

There are also some differences between the nonstructural safeguards applicable to CPE and enhanced services. The FCC's ONA safeguards are specifically applicable only to enhanced services, although the ONA services themselves must be available to other users. Conversely, centralized operations groups ("COGs") and joint marketing sales agency safeguards are specifically applicable only to CPE.^{1/} However, the overall purposes of the safeguards are very much the same -- to ensure that a local exchange carrier's control of bottleneck facilities does not result in unfair

^{6/} (...continued)

enhanced services. At this time, no comparable modification has been made to the CPNI rules applicable to BOC provision of CPE. However, NATA has had indications that a number of BOCs are applying a prior authorization requirement in practice to above-20-line CPE customers because efficiencies of administration require that the same CPNI practices be followed with respect to CPE and enhanced service customers.

With respect to network information disclosure, the Commission has specifically recognized that there should be consistent rules applicable to a carrier's CPE and enhanced service operations. Enhanced Service Safeguards Order, at 3092. Therefore, identical network information disclosure rules have been adopted for CPE and enhanced services.

With respect to nondiscriminatory installation and maintenance, for both CPE and enhanced services the BOCs have been required to submit plans describing how they will ensure nondiscriminatory installation and maintenance of network services. Enhanced Service Safeguards Order, at 3086; CPE Safeguards Order at 155.

^{1/}In the CPE Safeguards decision, the FCC required the BOCs to maintain COGs to ensure that non-BOC CPE vendors and their customers have a centralized point for contact, installation, coordination, and administration of the network services they require from the BOC. CPE Safeguards Order, 2 FCC Rcd at 155. The COG safeguard does not apply to enhanced services.

In addition, the Commission also required the BOCs to provide independent CPE vendors "a meaningful opportunity to market Centrex and other BOC network services through sales agency plans or other functionally equivalent means." Id. at 156. These two safeguards do not apply to enhanced services.

KECK, MAHIN & CATE

Chairman Alfred C. Sikes
December 22, 1992
Page 6

discrimination against competing CPE or enhanced service providers.

In addressing the issue of the applicability of these nonstructural safeguards to GTE, the Commission used the same criteria in deciding whether to apply the safeguards to GTE's enhanced services as it had used in deciding whether to apply similar safeguards to GTE's CPE.

In the CPE Safeguards Order, the Commission noted that GTE's overall operations were roughly comparable in size to a BOC's. However, the Commission noted that GTE had smaller, more scattered and more rural service areas, with fewer business customers. Balancing these factors, the Commission stated that "it is a close case" whether or not to apply nonstructural safeguards to GTE's CPE operations. On balance, the Commission concluded that GTE would be less likely than the BOCs to engage in anticompetitive conduct, and also concluded that the application of nonstructural safeguards to GTE's provision of CPE was not warranted. CPE Safeguards Order, 2 FCC Rcd at 158.

The Commission's Enhanced Service Safeguards Order applied identical criteria to reach an identical conclusion regarding GTE's enhanced services. Again acknowledging that GTE's operations, in the aggregate, were roughly comparable to those of the BOCs, the Commission again relied on the facts that GTE's service areas were smaller and less densely populated, and had fewer business customers. The Commission therefore concluded that GTE had more limited opportunities than the BOCs to use bottleneck control over local exchange facilities for anticompetitive purposes, and also concluded that the benefits from the application of nonstructural safeguards to GTE were outweighed by the costs.

In the GTE Notice, the Commission has decided to review, in light of GTE's merger with Contel, the reasoning that led it five years earlier to conclude that nonstructural safeguards should not apply to GTE. The Commission notes that the Contel merger has significantly expanded the scope of GTE's operations, adding approximately \$3.4 billion in revenues, 2.7 million access lines, and 1700 local exchanges. This expansion makes GTE one of the largest local exchange carriers in the United States. By almost any measure, GTE is now larger than most BOCs. The Commission finds that this substantial increase in GTE's size and financial strength enhances GTE's ability to participate in the enhanced services market and its ability and incentive to discriminate against competitors. Accordingly, the Commission tentatively concludes that there will be substantially greater public interest benefits to be gained by applying nonstructural safeguards to GTE's provision of enhanced services. GTE Notice, ¶8. The Commission

KECK, MAHIN & CATE

Chairman Alfred C. Sikes

December 22, 1992

Page 7

also finds that GTE's increase in size enhances its ability to economically comply with such safeguards. *Id.*, ¶9. The Commission tentatively concludes that the rural, dispersed characteristics of GTE's service areas -- the factors which previously led the Commission to decline to apply nonstructural safeguards -- are outweighed by GTE's increased size and strength, and that under these circumstances the public interest will be served by now applying nonstructural safeguards to GTE's provision of enhanced services.

All the changed circumstances enumerated above, which have led the Commission to review whether nonstructural safeguards should apply to GTE's enhanced services, should lead the Commission also to review whether nonstructural safeguards should apply to GTE's CPE operations. As noted above, the CPNI and network disclosure requirements, which would apply to GTE's CPE are almost identical to the CPNI, and network disclosure requirements which would apply to GTE's enhanced services. In addition, the nature of the anticompetitive threats that these and other nonstructural safeguards are intended to combat are very similar in the CPE and enhanced services markets. Further, the reasons for and against applying nonstructural safeguards to GTE are the same for CPE as for enhanced services. Just as GTE's increased size has increased the danger that it will behave anticompetitively in the enhanced service markets, it has also increased the danger that GTE poses to the CPE markets. Further, GTE's improved ability to economically comply with nonstructural safeguards is as applicable to CPE-related safeguards as to the (in many cases almost identical) enhanced service safeguards. Finally, the continuing rural and dispersed characteristics of GTE's service areas -- compared to those of the BOCs -- do not carry any more weight with respect to the CPE safeguards issue than with respect to the analogous enhanced services issue.

Significantly, when the Commission decided in 1987 not to apply nonstructural safeguards to GTE's CPE operations, it specifically acknowledged that the question was "a close case." CPE Safeguards Order at 158. Therefore, and in light of all the similarities noted above, if the Commission has tentatively concluded -- as it has -- that GTE's changed circumstances tips the scales in favor of applying nonstructural safeguards to GTE's enhanced service operations, then the Commission must also conclude (at least tentatively) that the scales have also tipped in favor of applying such safeguards to GTE's CPE operations.

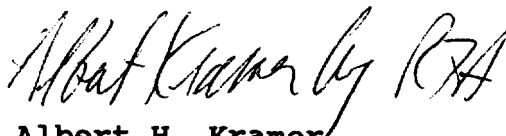
In summary, the Commission has historically applied consistent regulatory treatment to particular carriers' provision of enhanced services and CPE. The Commission's policy regarding enhanced

KECK, MAHIN & CATE

Chairman Alfred C. Sikes
December 22, 1992
Page 8

services and CPE is stated in a single Commission rule. Where safeguards apply to carrier provision of these offerings, a closely similar set of safeguards applies to enhanced services and to CPE. When the Commission has modified its policy regarding the application of safeguards to particular carriers, the Commission has made consistent with respect to both enhanced services and CPE. Finally, whenever the Commission has made a decision regarding the application of safeguards to GTE, the Commission has used the same criteria and rationale, with the same result, with respect to GTE's enhanced services and its CPE. The Commission's decision to reconsider its policy regarding application of safeguards to GTE's enhanced services also relies on criteria which are equally applicable to CPE. Therefore, we request the Commission to issue a further or supplemental notice of proposed rulemaking in Docket 92-256, in which the Commission reexamines whether the nonstructural safeguards currently applicable to the BOCs' provision of CPE should also apply to GTE's provision of CPE.

Sincerely,

A handwritten signature in dark ink, appearing to read "Albert H. Kramer" followed by a stylized monogram or set of initials.

Albert H. Kramer
Attorney for the North American
Telecommunications Association

cc: Cheryl Tritt